SUPREME COURT, U. S.
No. 438
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE MONROE SANDER CORPORATION,

Petitioner,

—against—

DAVID LIVINGSTON, individually and as the President of DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, The Monroe Sander Corporation, respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review the judgment of that Court dated May 3, 1967 which by a divided court affirmed the decision and order of the United States District Court for the Southern District of New York, per Tenney, J., dismissing petitioner's complaint seeking to stay arbitration of an alleged labor dispute.

The Opinions Below

The opinion of the Court of Appeals for the Second Circuit has not been officially reported but is reported in 1967 CCH, 55 Labor Cases ¶11,894, p. 18,938 and 65 LRRM 2273. A copy of said opinion and the judgment thereon is included in Appendix A annexed hereto. The opinions

of the District Court on the motion and on reargument are reported in sequence at 262 F. Supp. 129 (S.D.N.Y. 1967), and are printed in the Joint Appendix of Plaintiffs-Appellants in the Court of Appeals below (Jt. App. 14-35).*

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was rendered and entered on May 3, 1967. (App. 20).** Petitioner's petition for a rehearing was denied on June 21, 1967 (App. 24-26). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

This case presents, in the context of clear and undisputed facts, important questions in an area of labor arbitration law which is as yet in an amorphous condition, and which confronts the lower courts and the National Labor Relations Board almost daily.*** It is submitted that in the present case the principles delineating the obligations of an owner of an alleged successor enterprise to arbitrate with the former bargaining representative of a predecessor's employees as set forth in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), have been unwarrantedly

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* References designated "Jt. App." are to pages of the Joint Appendix of Plaintiffs-Appellants in the Court of Appeals below, nine copies of which have been filed with this Court.

** References designated "App." are to pages of the Appendix to this petition.

*** See text of speech on July 7, 1967 by NLRB Member John H. Fanning before the Labor Law Section of the State Bar of Texas entitled "The Purchaser and the Labor Contract—An Escalating Theory", 1967 CCH Labor Law Reports ¶8087, Vol. 3, p. 13755, 66 LRR 169.

extended; that the *Wiley* decision has been misinterpreted as requiring arbitration even when the sole purpose of the arbitration is to further an illegal demand for the discriminatory discharge of non-union employees; and that *Wiley* has been misinterpreted as requiring arbitration even when it would disrupt industrial peace by posing an unlawful threat to the job rights of non-union employees not entitled to participate in the arbitration proceeding.

Petitioner (hereinafter "Sander") is a wholly owned subsidiary of American Petrochemical Corp. (hereinafter "Petrochemical"), which owns a number of paint manufacturing plants throughout the country. Sander formerly owned and operated a paint manufacturing plant in Long Island City, New York. In June, 1966, after the expiration of the last collective bargaining agreement between Sander and respondent Union, Sander's plant was shut down and its production operations discontinued because of overriding economic difficulties.

In July, 1966, pursuant to an agreement entered into in April, 1966, Petrochemical purchased from Lacquer Specialties, Inc., a company based in Newark, New Jersey, its business (hereinafter the "Lacquer Business") as a going concern, including its plant, employees, customers, goodwill, etc., and transferred the ownership thereof to a newly formed subsidiary of Petrochemical. Unlike all other divisions of Petrochemical's business, the Lacquer employees are not unionized. Petrochemical has operated the Lacquer business as before except that in addition to selling to its own customers the Lacquer business has also sold products to whatever customers of Sander have been salvaged.

During collective bargaining sessions (which the Union refused to enter into until just two weeks prior to the expl-

ration of its collective bargaining agreement with Sander) the Union demanded that its members be hired at the Lacquer plant in Newark and that the Lacquer employees be discharged to make room for them. Management resisted this demand because of its manifest unfairness to the Lacquer employees and because the discharges demanded by the Union, if effected, would constitute discriminatory discharges in violation of Section 8(a)(3) of the National Labor Relations Act, as amended. When an impasse was reached on this issue, the Union demanded arbitration under the provisions of the expiring collective bargaining agreement. (Subsequently, during the pendency of the District Court actions, the Union filed NLRB charges against Sander for allegedly having violated Sections 8(a)(1), (3) and (5) of the NLRA by refusing to grant the Union's demands. After investigation these charges were dismissed as groundless. See pp. 9-10 below.)

A divided Court of Appeals has required arbitration of the Union's claim that its members should be given the jobs long held by Lacquer employees.

Under the foregoing circumstances, this case presents the following questions:

1. Did the Court of Appeals err in requiring arbitration of the Union's illegal demand that employees of the Lacquer Business be displaced by the Union's members?

2. Has the Court of Appeals created an unwarranted difference in the legal protection of union and non-union employees by now requiring arbitration of the Union's demand for the jobs of the *non-union* Lacquer

employees after holding in *McGuire* v. *Humble Oil & Refining Company*, 355 F. 2d 352, 2d Cir. (1966) cert. denied, 384 U. S. 988 (1966) that arbitration should not proceed where a union's demands conflicted with the rights of another group of *unionized* employees?

3. Since directing arbitration of the Union's demand that its members be given the jobs of the Lacquer employees must create unrest and dissatisfaction amongst those employees, does the requirement for arbitration of a demand such as that of the Union conflict with the national labor policy in favor of orderly collective bargaining and the preservation of industrial peace?

4. Did the Court of Appeals err in finding a substantial continuity of identity to exist between the Lacquer Business and the discontinued Sander Business?

Statutory Provisions Involved

This case involves the National Labor Relations Act, 29 U. S. C. §§ 151 et seq., §§ 7 (29 U. S. C. A. § 157), 8(a)(3) (29 U. S. C. A. § 158(a)) and 8(b)(2) (29 U. S. C. A. § 158(b)). The texts of these provisions are set forth in Appendix B annexed hereto (App. 30).

Statement of the Case

The Facts

The pertinent facts were found by the Court of Appeals (App. 3-5) as follows:

> "Sander owned and operated a Long Island City, New York plant, which, starting in the 1920's,

had manufactured paints, lacquers, varnishes and enamels. Since 1964, Sander has been a wholly-owned subsidiary of the American Petrochemical Corporation. For over twenty-five years the union was the authorized bargaining representative of Sander's production employees. On June 15, 1964, Sander and the union executed a one year collective bargaining agreement, which, on October 11, 1965, was extended retroactively from June 15, 1965 to June 15, 1966.

"On January 28, 1966, pleading continued inability to turn a profit even after the Petrochemical takeover, Sander informed the union that 'we may find it necessary to close the company entirely, move to a different plant which lends itself to greater production efficiency or combine the products of this plant with another operation of the company either now in existence or which may be acquired in the future.' Two months later, on March 30, in response to a letter of March 25 in which the union stated that it would seek modification of the collective agreement, Sander proposed to extend the existing contract to October 31, 1966, at which time it would expire in its entirety. Under the terms of this proposal, Sander would be allowed to transfer production to a new location at any time.

"During early April, Sander met with the union as well as with its employees and explained its economic situation. The union demanded a new contract. At about the same time, Sander informed the union Petrochemical was considering acquiring Lacquer, a modern, non-union manufacturer of paints and lacquers, located in Newark, New Jersey, which had the capacity to service all of Sander's customers. Sander also notified its customers of the intention to take over Lacquer. Then, on April 22,

the union replied to the company's March 30 proposal with a counter-proposal for a two year contract containing, among other matters, substantial wage increases.

"On April 28, Petrochemical agreed to acquire the business and assets of Lacquer contingent upon several conditions which were fulfilled in July. Thereupon, although the record is not clear on this point, Lacquer apparently became a wholly owned subsidiary of Petrochemical and seems to continue to do business under its original name. During late May and early June more meetings occurred with the union raising questions concerning the Moving and Basic Crew Clauses of the collective agreement.* On June 4 Sander repeated its March 30 offer. Provided Petrochemical took over Lacquer, Sander also promised its employees preferential hiring at the Newark plant for a four month period commencing on June 15, the expiration date of the contract. Sander made this preferential hiring promise contingent as well on the availability of jobs, the prospect of which was not very promising. No positions were then available; and, even if Lacquer were to service Sander's customers, the New Jersey plant was capable of increasing productivity without hiring new employees.

"With the union still demanding jobs at Lacquer, bargaining broke down. On June 7 the union served

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* The District Court's opinion contains the additional facts (1) that from the second week of May until early June ". . . the employees of Monroe [Sander] began activity to interrupt said corporation's production by means of excessive absenteeism, slowdown of work and sabotage." (262 F. Supp. 129, 132; Jt. App. 18) and (2) that bargaining sessions were not entered into by the Union until June 1, 1966 in response to a May 30th telegram by Sander demanding such meetings because of the sabotage and the Union's refusal since April to bargain about the effects of the impending plant shutdown (262 F. Supp. 129, 132-133; Jt. App. 18).

on Sander and Lacquer a demand for arbitration 'concerning the Company's current breach and its threatened removal of its operations from Long Island City to Lacquer Specialties, Inc., in Newark, New Jersey, in derogation of the rights of the Union and the employees it represents.' The actions at bar to stay the demanded arbitration, ensued.

"It should be mentioned initially that no unfair labor practice issues are presented on this appeal. The union did file charges of §8(a)(3) and §8(a)(5) violations, 29 U.S.C. §§158(a)(3), 158(a)(5), with the Brooklyn Regional Office of the National Labor Relations Board. The Regional Director, however, refused to issue a complaint and dismissed the charges. Meanwhile, the union withdrew the charges. The Director approved this withdrawal and then withdrew his dismissal."

Decision of the Courts Below

Sander and Lacquer Specialties, Inc., the former owner of the Lacquer Business, brought actions in the United States District Court for the Southern District of New York under §301 of the Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. §185, and the Declatory Judgment Act, 28 U.S.C. §§2201-02, for declaratory judgments permanently staying the arbitration demanded by the Union. District Judge Charles H. Tenney thereafter granted the Union summary judgment dismissing these actions (262 F. Supp. 129; Jt. App. 14) on the grounds, insofar as pertinent, (1) that arbitration of the Union's illegal demand for the displacement of the Lacquer employees might still contribute to industrial peace, (2) that an illegal arbitrator's award could be subsequently remedied by an action to vacate the award, and (3) that in the Court's view there was a substantial continuity of identity between

the Lacquer Business and the discontinued Sander Business. After granting plaintiffs' motions for reargument Judge Tenney adhered to his original decision (262 F. Supp. 129, 137; Jt. App. 29).

On appeal a panel of the Court of Appeals for the Second Circuit consisting of Chief Judge Lumbard and Circuit Judges Smith and Anderson reversed as to Lacquer Specialties, Inc. but, over the vigorous dissent of the Chief Judge, affirmed the District Court's decision as to Sander and, in addition, ordered arbitration between the Union and the present owner of the Lacquer Business although the latter was not a party to the litigation (1967 CCH, 55 Labor Cases ¶ 11, 894, p. 18,938, 65 LRRM 2273; App. 1-19). The majority held that the Union's demand for the jobs of the Lacquer employees was arbitrable under the collective bargaining agreement between Sander and the Union; that there was substantial continuity of identity between the discontinued Sander Business and the Lacquer Business; and that the Court of Appeals' prior decision in *McGuire* v. *Humble Oil, supra,* was not applicable solely because the employees whose rights would be violated by the demanded arbitration were unionized in *McGuire* v. *Humble* and were not unionized in the present case.

Sander applied for a rehearing of the majority decision insofar as it required the arbitration of the Union's demand that the Lacquer employees be displaced by the Union's members. The application was denied, Chief Judge Lumbard again dissenting (App. 24).

Related Proceedings Before The National Labor Relations Board

While the actions of Sander and Lacquer Specialties, Inc. were pending in the District Court, the Union filed charges

with the Brooklyn Regional Office of the NLRB alleging that Sander had violated Sections 8(a)(1), (3) and (5) of the NLRA. The Union charged that Sander had locked out and refused to hire the Union's members, that Sander had removed its operations to Newark, New Jersey and refused to recognize the Union or its members there and that Sander had not bargained in good faith with the Union because of its refusal to arbitrate with the Union about job rights at the Lacquer plant.

After extensive investigation the Regional Office of the NLRB found that the Union's charges were baseless. The findings of the Regional Director in pertinent part were that:

> "The investigation did not establish that Monroe Sander Corporation locked out and refused to reinstate its employees, or that the Company unlawfully refused to recognize District 65, Retail, Wholesale Department Store Union, AFL-CIO, as the bargaining representative for the employees in the Newark, New Jersey location, or that it otherwise unlawfully refused to bargain with your union. Rather, the evidence tends to show that the Company closed down the Long Island City operation for economic reasons, discontinued such operation and bargained in good faith concerning the effect of such shutdown and concerning the rehire of the employees in New Jersey. In the circumstances the Company's failure to employ the Long Island City employees in New Jersey is not unlawful." (Appendix C annexed hereto, App. 32-33).

It was on this determination that the Court of Appeals correctly stated in its opinion that ". . . no unfair labor practice issues are presented on this appeal." (App. 5).

Reasons For Granting Certiorari

A prominent feature of the post-war American economy has been a trend towards business consolidation through an increasing number of various types of corporate acquisitions. Because of the large and various groups of workers and large numbers of employers affected by this trend, it is important for the courts to develop a body of law which equitably defines the rights and obligations of the managements and groups of employees who may be involved in a given acquisition situation. Petitioner respectfully submits that a writ of certiorari should issue to the Court of Appeals for the Second Circuit because it has by its decision in the present case erroneously defined the law in this vital area in the following important respects:

1. The majority of the Court of Appeals has misinterpreted the policy favoring labor arbitration enunciated by this Court as a policy which requires arbitration even when the relief demanded and the arbitration process would clearly contravene the NLRA, and illegally infringe upon the rights of employees not parties to the collective bargaining agreement under which arbitration is sought.

2. The majority of the Court of Appeals by its decision in this case, as contrasted with the decision in *McGuire* v. *Humble Oil Company, supra,* has denied to non-union employees a protection which it has granted to union employees against unwarranted interference with their employment rights by means of an arbitration in which they are not represented, thus making a distinction based upon union or non-union membership which conflicts with the policy and provisions of the NLRA.

3. The majority of the Court of Appeals has required arbitration in a matter where the arbitration process can only have a disruptive effect upon orderly collective bargaining and industrial relations.

4. The Court of Appeals' decision has extended the obligation of a "successor" employer to arbitrate with the representative of the employees of a "predecessor" far beyond what was intended by this Court in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), in that it has (with very inequitable consequences) imposed this obligation in a situation where no substantial continuity of identity exists between the alleged predecessor and successor businesses.

(1)

The Union's demand that its members displace the Lacquer employees is plainly illegal. The demand itself clearly violates Section 8(b)(2) of the NLRA and compliance with the demand by the employer would violate Section 8(a)(3) of that Act. The entire panel of the Court of Appeals was in apparent agreement as to the illegality of the Union's demand. As the majority stated in the concluding paragraph of its opinion (App. 14) ". . . [an arbitrator's] decision requiring displacement of employees already employed at Lacquer before the takeover might well be considered to contravene national policy." Nevertheless, the majority of the panel, over the dissent of Chief Judge Lumbard, requires that the Union's demand be submitted to arbitration.

The Court of Appeals recognizes at the outset of its opinion that under this Court's ruling in *Atkinson* v. *Sin-*

clair Ref. Co., 370 U.S. 238, 241 (1962) it is the duty of a court to determine what issues must be arbitrated as a threshold question (App. 5-6). However, the majority has abdicated this function by requiring arbitration of the Union's illegal demand.

A principal reason why the Court of Appeals has fallen into this error is that it has failed to recognize the distinction between a situation such as that presented in *Wiley* v. *Livingston, supra,* in which the "flexible procedures of arbitration" may permit a solution to the issues which would not illegally infringe upon the rights of third party employees and the situation presented by the present case where the nature of the Union's demand precludes the possibility of any such adjustment. In this respect we submit that the majority of the Court of Appeals was in error in stating that "It makes no difference that jobs may be at stake here, and seniority rights, pension funds, grievance and job security provisions, and severance and vacation pay were involved [in Wiley]." (App. 14). The issues as to the group and secondary rights involved in *Wiley* clearly might be adjusted in a manner acceptable to all concerned. However, the Union's demand in the present case that its members be given the jobs of the Lacquer employees admits of no such flexibility. As to this issue, the arbitrator must either give a "yes" or "no" answer. Since an affirmative answer would clearly violate the provisions and policies of the NLRA, this case falls not within that category of cases where the "flexible procedures of arbitration" give grounds for hope that a claim may be adjusted without violating the rights of third party employees. Instead, it falls within that other category of cases alluded to in *Wiley* wherein the Union's demand is ". . . so plainly unreasonable that

the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." 376 U.S. 543, 555.

Illegality of the award sought by the Union is not the only reason for a stay of arbitration. In the present case the illegality also infects the arbitration process itself. The Union's demand that its members displace the Lacquer employees violates Section 8(b)(2) of the NLRA which forbids a Union to demand that an employer make a discriminatory discharge of non-union employees. If making this demand contravenes Section 8(b)(2), then pursuing the demand in an arbitration proceeding must also violate Section 8(b)(2).

In *McGuire* v. *Humble Oil, supra,* an entirely different panel of the Court of Appeals recognized the principle that arbitration should be stayed when the arbitration process itself violates a provision of the NLRA. In that case Humble had purchased from another corporation a division of its business and had absorbed into its organization on a volunteer basis those employees of the selling corporation who wished to continue. The Teamsters, which had represented the employees of the selling corporation, sought to compel Humble to arbitrate claimed disputes under the terms of an unexpired collective bargaining agreement existing between the selling corporation and that union. Humble's other employees were represented by a different union. The Court of Appeals refused to order arbitration on the grounds that the arbitration process would involve Humble in a violation of Section 8(a)(5) of the NLRA by requiring it to bargain with a minority union when there was a majority union in existence, and on the

grounds discussed below (see sections "(2)" and "(3)" hereof) that the arbitration process would contravene national labor policy by provoking unrest and dissatisfaction amongst Humble's other employees. We submit that the Court of Appeals holding in *Humble* was sound and that if an arbitration proceeding should be stayed because it violates Section 8(a)(5) of the NLRA then arbitration should also be stayed if it violates Section 8(b)(2).

(2)

The Court of Appeals has distinguished *McGuire* v. *Humble* from the instant case upon the narrow grounds that in *McGuire* the employees who were strangers to the arbitration proceeding were unionized whereas the Lacquer employees are not unionized.

This distinction contravenes Section 7 of the NLRA and results in unfairness to non-union employees. The contrasting decisions of the Court of Appeals in *McGuire* v. *Humble Oil* and in the present case have resulted in a situation where non-union employees have been denied protections which are accorded to union employees. In the present case, arbitration is permitted to proceed because the Lacquer employees do not belong to a union; whereas, under the *McGuire* v. *Humble* decision the arbitration would not be permitted if the Lacquer employees did belong to a union. Thus, those employees are penalized for not belonging to a union, despite the mandate of Section 7 of the NLRA, by having their jobs placed in jeopardy in an arbitration proceeding in which they do not even have a voice. This result clearly infringes upon the rights of the Lacquer employees, guaranteed in Section 7 of the NLRA,

to refrain from union membership. In effect, it coerces these employees and other employees who may not desire to belong to any union to join one in order to protect their job rights, contrary to the national labor policy.*

It may not be the usual function of this Court upon review by certiorari to reconcile apparent conflicts amongst decisions within a given circuit. We submit, however, that the insistence of the NLRA upon equal treatment for union and non-union members is so clear that this Court should act to remedy the departure from this national policy by the Court of Appeals in this case.

(3)

The Court of Appeals recognized in *McGuire* v. *Humble, supra,* that arbitration should not be ordered when the proceeding threatens a serious infringement upon the rights of employees who are strangers to the arbitration proceeding. In that case the Court refused to order arbitration, noting that if arbitration were permitted ". . . it is not unlikely that [the Teamsters] would press for an award giving [the former employees of the selling corporation] preferential treatment in the matter of seniority, job security, working conditions and other benefits that would adversely affect the other Humble employees. The result might well be unrest and dissatisfaction among the vast majority of workers in the plant. Such a burdening of the collective bargaining relationship is clearly to be avoided, as a matter of national labor policy." 355 F. 2d 352, 357.

* The District Court notes that "The Lacquer production employees do not belong to a union and have resisted organizers' overtures to them concerning union representation." (262 F. Supp. 129, 133; Jt. App. 19-20).

In the present case the danger of the arbitration proceeding provoking industrial unrest ". . . is even stronger . . . as an award requiring the discharge of some or all Lacquer employees not only might, but certainly would, cause grave unrest and dissatisfaction among these employees" (dissenting opinion of Lumbard, C.J., App, 16).

It is also clear that the Union's demand for the displacement of the Lacquer employees involves a much sharper conflict of interest between the Union's members and the Lacquer employees than anything involved in *Wiley* v. *Livingston* or, to the best of counsel's knowledge, any other decided case. As Judge Lumbard's dissenting opinion states:

> ". . . an award requiring the discharge of some or all Lacquer employees not only might but certainly would cause grave unrest and dissatisfaction among those employees. The inevitable, direct, and catastrophic impact such an award would have upon the Lacquer employees cannot be equated with the possible problems of special treatment as to seniority, pensions, and similar matters which the Supreme Court was confident could be avoided in *Wiley.*" (App. 16).

Furthermore, it is not merely an arbitrator's award which would provoke unrest and dissatisfaction. The arbitration proceeding itself is aimed directly at the employment security of the Lacquer employees. Therefore, ". . . the very process of arbitrating the union's demand for existing jobs at Lacquer would lead to unrest and dissatisfaction among the Lacquer employees." (dissenting opinion of Lumbard C.J., App. 19). Under these circumstances, arbitration becomes not a means for the maintenance of

industrial peace, but an instrument for the provocation of industrial strife. It is, therefore, a distortion of this Court's meaning to ground an order for arbitration in the instant case upon this Court's remarks in *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) that arbitration provisions are a "major factor in achieving industrial peace" (App. 6).

(4)

This Court in *Wiley* v. *Livingston, supra,* (376 U.S. 543, 551) stated that:

> "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved."

The majority of the Court of Appeals has found a "substantial continuity of identity" to exist between the discontinued Sander operations and the Lacquer Business. However, we submit that in making such a finding of fact under the circumstances of the present case, and in employing the criteria of substantial continuity used, the majority has extended the application of collective bargaining agreements to alleged "successor" enterprises far beyond what was ever intended by this Court.

The majority bases its finding of a substantial continuity of identity upon the following factors: "Both plants were

located in the New York metropolitan area, both were engaged in the same line of business, the jobs in each were seemingly similar and Petrochemical planned to have the New Jersey plant service Sander's customers." (App. 12). Three of these factors are *totally* irrelevant. The fact that two enterprises are engaged in the same type of business, have employees who do the same type of work, and are located within the same metropolitan area, obviously does not constitute one enterprise the successor of the other.

The only factor which has any relevance is that the Lacquer Business, in addition to servicing its own customers, also services whatever customers of Sander have been salvaged from the demise of that enterprise. This alone is not sufficient to establish substantial continuity of identity between the discontinued Sander Business and the Lacquer Business. For against this one tenuous connection between the Sander Business and the Lacquer Business must be weighed the following factors: (1) that the Lacquer Business is still basically the same enterprise which it was before Petrochemical acquired it; (2) that the Lacquer Business still operates at the same plant and with the same equipment as it did prior to the Petrochemical takeover; (3) that the Lacquer Business still produces the same products as it did before the Petrochemical takeover, and continues to sell those products to the same customers as before the Petrochemical takeover while also serving customers who have been salvaged from Sander's demise; (4) that none of Sander's employees went to work for the Lacquer Business;* and (5) that no production jobs derived

* Board Member Fanning in his July 7th speech before the State Bar of Texas stated that whether or not a new enterprise employs the workers of the former enterprise is a factor considered by the NLRB in successorship cases. 1967 Labor Law Reports ¶8087, Vol. 3, pp. 13755, 13757, 66 LRR 169, 171.

from or attributable to the discontinued business of Sander are held by any employee of the Lacquer Business, which operates with exactly the same production staff as it had prior to its acquisition by Petrochemical. In other words, the obvious continuity of identity which exists is between the Lacquer Business as it exists today and the Lacquer Business as it existed prior to the Petrochemical takeover, and not between the Lacquer Business and the discontinued Sander Business.*

The Court of Appeals majority has failed to take into account any of the foregoing. It has also lost sight of the

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* In a recent paper entitled "The Successor and the Collective Agreement", David E. Feller, Esq. bases the test to determine whether or not a collective bargaining agreement (including its arbitration provisions) is binding upon an alleged successor enterprise upon whether or not, irrespective of any change of ownership, the nature of the successorship has brought about "a destruction of the industrial community" represented by the predecessor enterprise (SOUTHWEST LEGAL FOUNDATION, 13TH ANNUAL INSTITUTE, *Labor Law Developments 1967* (Matthew Bender, 1967) 1, 13-16). Mr. Feller points to the factual distinction between the *Wiley* situation and the facts presented in the record in *McGuire* v. *Humble, i.e.* that in *Wiley* the purchaser acquired the plant and operating equipment of another enterprise and continued to operate that plant and equipment subsequent to the acquisition; whereas in *McGuire* the purchaser acquired primarily the customer accounts, and did not use whatever operating assets were purchased in the acquired business. Thus, Mr. Feller feels that "a destruction of the industrial community" of the predecessor enterprise took place in *McGuire* which did not take place in *Wiley*. He states (id at p. 15) that "The distinction which the [Court of Appeals] drew between the *McGuire* case and *Wiley*—that in *Wiley* there was no other union in the merged operation—should make little or no difference." [See Section (2) of this petition, pp. 15-16.] Mr. Feller concludes that a rule to be derived from *McGuire* "... is that the court and not the arbitrator, as in the *Wiley* case, may itself determine whether there was, simultaneously with the transfer, such a change in the operation (which I call the 'industrial community') to be governed by the collective bargaining agreement that it can be said that, as a result, the agreement terminated as an effective prospective regulation." (id at p. 16).

fact that the purpose of an inquiry into the existence of continuity of identity is not an academic one. The purpose of such inquiry is to determine whether the obligations of a collective bargaining agreement in force at an alleged "predecessor" enterprise are to be imposed upon an alleged "successor" enterprise. The imposition of such obligations upon a supposed successor enterprise has drastic consequences for those persons at the "successor" who were not parties to the collective bargaining agreement, and, when such obligations are imposed upon a "successor" in the absence of sufficient continuity of identity to warrant it, the result is a gross distortion in the equities between the various persons affected.

No case more aptly illustrates this principle than the present one wherein the Union, relying upon the merest filament of continuity between the discontinued Sander Business and the Lacquer Business, has asserted the fantastic claim that the collective bargaining agreement between Sander and the Union applies with full force to the Lacquer Business and entitles the Union's members to employment rights at the Lacquer Business superior to those of the Lacquer Business employees. This claim has no support in law or reason and distorts the meaning of *Wiley*. As dissenting Chief Judge Lumbard states:

> "... where such an interest [the 'clearly justified reliance interest of other employees' in the continuity of their employment and working conditions] is present, as it is in this case, *Wiley* does not support an order directing arbitration on the sole ground that the acquired plant manufactures similar products in the same metropolitan area as the discontinued plant." (App. 18).

CONCLUSION

For the reasons set forth above, we respectfully submit that this petition for a writ of certiorari should be granted and that this Court should thereafter reverse the decision of the Court of Appeals for the Second Circuit insofar as that decision requires arbitration of the Union's demand that its members be given the jobs of the Lacquer employees.

Respectfully submitted,

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APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 352, 353—September Term, 1966.

(Argued February 10, 1967 Decided May 3, 1967.)

Docket Nos. 31025, 31026

THE MONROE SANDER CORPORATION,

Plaintiff-Appellant,

—v.—

DAVID LIVINGSTON, individually and as the President of DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Defendant-Appellee.

LACQUER SPECIALTIES, INC.,

Plaintiff-Appellant,

—v.—

DAVID LIVINGSTON, individually and as the President of DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
SMITH and ANDERSON, *Circuit Judges.*

Companion appeals by The Monroe Sander Corporation and Lacquer Specialties, Inc., from summary judgments in the United States District Court for the Southern District of New York, Charles H. Tenney, *Judge*, which dismissed actions brought under §301 of the Labor-Management Relations Act and the Declaratory Judgment Act seeking a stay of labor arbitration. Affirmed as to Monroe Sander. Reversed as to Lacquer Specialties.

Irwin M. Rosenthal, New York, N. Y. (Edward L. Skolnik, Stephen Lowey, and Weiss, Bronston & Rosenthal, New York, N. Y., on the brief), *for plaintiff-appellant The Monroe Sander Corp.*

George Moskowitz, New York, N. Y. (Kirschenbaum, Moskowitz and Shapiro, New York, N. Y., on the brief), *for plaintiff-appellant Lacquer Specialities, Inc.*

Eugene E. Eisner, New York, N. Y., *for defendant-appellee.*

Smith, *Circuit Judge:*

The Monroe Sander Corporation and Lacquer Specialties, Incorporated brought actions under §301 of the Labor-Management Relations Act, 61 Stat. 156 (1947), 29 U. S. C. §185, and the Declaratory Judgment Act, 28 U. S. C. §§2201-02, which sought to stay permanently arbitration proceedings which had been demanded by District 65, Retail, Wholesale and Department Store Union, AFL-CIO. The United

States, District Court for the Southern District of New York, Charles H. Tenney, *Judge*, granting the union's motions for summary judgment under Fed. R. Civ. P. 56, dismissed the actions, and, after reargument on the merits, refused to vacate the original summary judgments. 262 F. Supp. 129. Sander and Lacquer now appeal from the dismissal of their actions. We affirm as to Sander and reverse as to Lacquer.

Sander owned and operated a Long Island City, New York, plant which, starting in the 1920's, had manufactured paints, lacquers, varnishes and enamels. Since 1964, Sander has been a wholly-owned subsidiary of the American Petrochemical Corporation. For over twenty-five years the union was the authorized bargaining representative of Sander's production employees. On June 15, 1964, Sander and the union executed a one year collective bargaining agreement, which, on October 11, 1965, was extended retroactively from June 15, 1965 to June 15, 1966.

On January 28, 1966, pleading continued inability to turn a profit even after the Petrochemical takeover, Sander informed the union that "we may find it necessary to close the company entirely, move to a different plant which lends itself to greater production efficiency or combine the products of this plant with another operation of the company either now in existence or which may be acquired in the future." Two months later, on March 30, in response to a letter of March 25 in which the union stated that it would seek modification of the collective agreement, Sander proposed to extend the existing contract to October 31, 1966, at which time it would expire in its entirety. Under the terms of this proposal, Sander would be allowed to transfer production to a new location at any time.

During early April, Sander met with the union as well as with its employees and explained its economic situation. The union demanded a new contract. At about the same time, Sander informed the union that Petrochemical was considering acquiring Lacquer, a modern, non-union manufacturer of paints and lacquers, located in Newark, New Jersey, which had the capacity to service all of Sander's customers. Sander also notified its customers of the intention to take over Lacquer. Then, on April 22, the union replied to the company's March 30 proposal with a counter-proposal for a two year contract containing, among other matters, substantial wage increases.

On April 28, Petrochemical agreed to acquire the business and assets of Lacquer contingent upon several conditions which were fulfilled in July. Thereupon, although the record is not clear on this point, Lacquer apparently became a wholly owned subsidiary of Petrochemical and seems to continue to do business under its original name. During late May and early June more meetings occurred with the union raising questions concerning the Moving and Basic Crew Clauses of the collective agreement. On June 4 Sander repeated its March 30 offer. Provided Petrochemical took over Lacquer, Sander also promised its employees preferential hiring at the Newark plant for a four month period commencing on June 15, the expiration date of the contract. Sander made this preferential hiring promise contingent as well on the availability of jobs, the prospect of which was not very promising. No positions were then available; and, even if Lacquer were to service Sander's customers, the New Jersey plant was capable of increasing productivity without hiring new employees.

With the union still demanding jobs at Lacquer, bargaining broke down. On June 7 the union served on Sander and Lacquer a demand for arbitration "concerning the Company's current breach and its threatened removal of its operations from Long Island City to Lacquer Specialties, Inc., in Newark, New Jersey, in derogation of the rights of the Union and the employees it represents." The actions at bar, to stay the demanded arbitration, ensued.

It should be mentioned initially that no unfair labor practice issues are presented on this appeal. The union did file charges of §8(a)(3) and §8(a)(5) violations, 29 U. S. C. §§158(a)(3), 158(a)(5), with the Brooklyn Regional Office of the National Labor Relations Board. The Regional Director, however, refused to issue a complaint and dismissed the charges. Meanwhile, the union withdrew the charges. The Director approved this withdrawal and then withdrew his dismissal.

Accordingly, the questions for review are: whether there is an arbitrable dispute and, if so, what issues are to be arbitrated; who are the parties to the arbitration; whether our holding in *McGuire* v. *Humble Oil & Ref. Co.*, 355 F. 2d 352 (2d Cir.), cert. denied 384 U. S. 988 (1966), compels a stay of arbitration in this case.

I.

The Supreme Court has ruled that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties,"[1]

[1] The District Court decided that there was an arbitrable dispute but failed to frame the issues for arbitration.

Atkinson v. *Sinclair Ref. Co.*, 370 U. S. 238, 241 (1962). In making this determination, a court must be mindful of the high place that arbitration holds in the national labor policy. "The present federal policy is to promote industrial stabilization through the collective bargaining agreement . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 578 (1960) [footnotes omitted]. Thus, the rule is that unless the parties expressly exclude a matter, the court will conclude that they intended to submit it to arbitration. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83. "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." *Id.* at 584-85. See also *Drake Bakeries Inc.* v. *Local 50, American Bakery & Confectionery Workers Int'l.*, 370 U. S. 254, 258-60 (1962).

Here, the arbitration clause is as broad as any imaginable. It covers "Any controversy, claim or dispute or grievance of any nature whatsoever arising between the Employer and the Union or any employees, including but not being limited to questions of meaning, interpretation, operation, or application of any clause of this agreement, or concerning any breach or threatened breach of this

agreement by either party or concerning any acts, conduct or relations of whatsoever nature between the Union and the Employer, directly or indirectly . . . " Moreover, there is no specific exclusionary clause. In fact, the parties did not even agree to the usual broadly-worded management functions clause.

After weeks of negotiations back and forth, the union demanded arbitration of the company's "current breach" and "threatened removal" during the term of the collective bargaining agreement.[2] Thus, contrary to appellants' assertion, this case is not controlled by *Procter & Gamble Independent Union of Port Ivory, N. Y.* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181, 183 (2d Cir. 1962), cert. denied 374 U. S. 830 (1963), in which we refused to compel arbitration where "the activities on which the discipline was based, the disciplinary measures the propriety of which the union seeks to arbitrate, and the filing of the grievances all occurred in the interval between the termination date of the old agreement and the effective date of the new agreement." Also, insofar as the union demands arbitration of rights not limited to the duration of the collective agreement, whether or not the dispute and the demand for arbitration occurred after the expiration of the agreement is irrelevant. *Piano & Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 221 F. Supp. 461 (N. D. Ill. 1963), rev'd 333 F. 2d 761, rev'd *per curiam* 379 U. S. 357 (1964); *Local Lodge No. 595* v. *Howe Sound Co.*, 350 F. 2d 508 (3d Cir. 1965). Likewise immaterial is the present expiration of the collective agreement.

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[2] We do not approve such a broadly-worded demand for arbitration, although we do not reverse here on that account, as we do not find that appellants here were misled.

In its brief to this court, the union describes the dispute as involving the issue of whether it has any "vested rights and benefits" in the New Jersey operation. The narrower issue, however, appears to concern job rights and is centered on the meaning of the Moving Clause of the agreement. That clause provides as follows: "The Employer agrees that he shall not *at any time* move his shop or operation from its present location to any place beyond reasonable commuting distance within the greater Metropolitan Area of New York. Reasonable commuting distance shall be construed as being within fifty (50) miles of New York City or Newark, New Jersey. In the event the plant is moved within the limits proscribed above and an employee *elects not to transfer* to the new location he shall be eligible for severance pay in accordance with Article 24 of this Agreement." [Emphasis supplied.] It should be noted, parenthetically, that unlike, for example, the Basic Crew Clause, the Moving Clause is not tied to the term of the contract. Also, it is clear that parties to a collective agreement may provide for the survival of obligations beyond the term of the agreement. See *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), aff'd on other grounds, 370 U. S. 530 (1962). Whether the union's position is also supported by the Basic Crew and New Workers Clauses would likewise be for the arbitrator. Also, whether the union "is right or wrong is a question of contract interpretation for the arbitrator." *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960). We have "no business weighing the merits of the grievance . . ." *Ibid.* Accordingly, in furtherance of the national labor policy to promote arbitration, we interpret

this very broad arbitration clause to which there are no exceptions as governing the dispute at bar.

We therefore require submission to arbitration of the general issue of whether the union is entitled to rights and benefits, especially jobs, at the New Jersey plant and the specific issue of the construction and interpretation of the Moving Clause. Appellants argue that this submission substitutes compulsory arbitration for collective negotiation. The short answer to this argument is that the union is only seeking to enforce any rights it may have under the expired contract and is not attempting to negotiate a new collective bargaining agreement.

II.

The next question to decide is with whom the union must arbitrate. In its demand for arbitration, the union named both Sander and Lacquer. Any claim that the former owner of the New Jersey plant, then known as Lacquer Specialties, Inc., is bound to arbitrate would be groundless. It never contracted with the union, has sold its business and assets and is in the process of liquidation. In fact, in his original decision of November 17, 1966, Judge Tenney ordered that "arbitration is to be deferred as to Lacquer until said corporation is formally acquired by Petrochemical." And, in his opinion of December 21 on reargument, the judge noted that he had been informed that the acquisition had transpired on the day of the oral argument of the original motion which appears to have been in July. Nevertheless, he did not grant the requested relief. We cannot determine from the record the form the

acquisition took, although the old corporation was represented to be the appellant in No. 31026, Cal. #353, at the oral argument. The complaint in No. 31026, Cal. #353, sets forth an agreement to sell the assets and business of the corporation. The letter of Monroe Sander to its customers, Appellants' Appendix, p. 118(a), speaks of a contemplated plan to acquire Lacquer Specialties, Inc. through an exchange of stock. The court, in its opinion on reargument, stated that "Plaintiffs inform the Court that the sale of Lacquer had been consummated . . . ." Consequently, we reverse and remand as to Lacquer only and order that the stay of arbitration issue forthwith but only as to the former owners. On the other hand, we affirm the dismissal as to Sander.

It would seem that Petrochemical, or its subsidiary, whichever now owns the New Jersey plant, would also be a proper party to the arbitration. In *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 551 (1964), the Supreme Court ruled that a survivor of a corporate merger was bound to arbitrate under a collective bargaining agreement entered into by the merged corporation provided that there was "any substantial continuity of identity in the business enterprise before and after" and the union did not "abandon its right to arbitration by failing to make its claims known." Courts of Appeals have applied the *Wiley* rationale where one business entity purchased assets from another. For example, the Third Circuit has held that a purchaser corporation was bound to honor a collective contract entered into by the seller despite a clause expressly to the contrary in the purchase agreement. The court directed arbitration to proceed under

the contract but somewhat qualified its mandate by stating that the arbitrator could give weight to any change of circumstance created by the transfer of ownership which might make adherence to any term of the agreement inequitable. *United Steelworkers of America* v. *Reliance Universal Inc.*, 335 F. 2d 891 (3d Cir. 1964). In a similar purchase and subsequent operation of a going concern, the Ninth Circuit held the purchaser bound by a collective agreement on the authority of *Wiley* and did not include the qualification detailed by the Third Circuit. *Wackenhut Corp.* v. *United Plant Guard Workers*, 332 F. 2d 954 (9th Cir. 1964). See also, *McGuire* v. *Humble Oil & Ref. Co.*, *supra*, where this court indicated that it would follow the Third and Ninth Circuits but went on to decide the case on other grounds. Furthermore, in *Piano & Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 379 U. S. 357 (1964), reversing *per curiam* 333 F. 2d 761 (7th Cir.), *Wiley* was held to be controlling where a corporation transferred operations from one plant to another which had not been operated before. There is no reason why the *Wiley* criteria for determining when one business entity is bound to arbitrate under a collective agreement entered into by another should not also apply to the situation at hand, a parent corporation's termination of one subsidiary plant and the purchase of another. So long as claims under the agreement are outstanding, it is immaterial that the agreement had expired when the final conditions of the Lacquer purchase were fulfilled.

The question of whether there is "any substantial continuity of identity" between Sander and Lacquer enterprises is to be answered by the Court, not the arbitrator.

Wiley at 546-47. In that case, Interscience Publishers merged its operations which consisted of a single plant in New York City into Wiley, a much larger publisher, and Wiley retained most of the Interscience employees in New York City. 313 F. 2d 52 at 53-54. In *Reliance Universal* and *Wackenhut, supra,* one entity purchased the business of another and continued the previous operation without significant change, employing substantially all of the seller's organized personnel. And, *W. W. Kimball* involved the transfer of manufacturing from a suburb of Chicago to Southern Indiana.

Here, it appears that the district court was correct in finding that there was "any substantial continuity of identity" between the Long Island City and Newark operations. Both plants were located in the New York metropolitan area, both were engaged in the same line of business, the jobs in each were seemingly similar and Petrochemical planned to have the New Jersey plant service Sander's customers. Appellants point to the fact that none of the former Sander employees were hired in New Jersey. The relevance of the successor's engaging its predecessor's employees, however, is to show similarity of operations. *Wiley* at 481. In this case, Sander's offer of preferential hiring was some evidence to that effect. Furthermore, there was other adequate evidence of identity of operations. Moreover, the failure to hire Sander employees in New Jersey could not be determinative where, as here, that failure is the nub of the dispute.

Consequently, Petrochemical's new subsidiary, apparently known as Lacquer, is bound to arbitrate unless the union has abandoned its right to arbitration by failing to

make its claims known. Even though the union only named Lacquer and Sander, it did not abandon its rights against the new owner of the New Jersey plant.

III.

Appellants urge that our decision in *McGuire* v. *Humble Oil & Ref. Co., supra,* compels a stay of arbitration in this case. In *McGuire,* Humble Oil purchased the fuel oil delivery business of Weber & Quinn, a retail coal and fuel oil enterprise. Of the 24 Weber & Quinn employees affected by the sale, Humble integrated 13 of them into a group of 355 workers. Local 553 of the Teamsters Union represented the 24 Weber & Quinn employees and the Industrial Employees Association represented the Humble employees involved. In a clarification proceeding conducted after the purchase, the National Labor Relations Board ruled that the Association was the exclusive bargaining representative of the former Weber & Quinn employees. 153 NLRB 1361 (1964). Citing the presence of a union at the successor, a fact which the Supreme Court noted was not present in *Wiley,* and the unit determination by the Labor Board, we refused to compel Humble to arbitrate with Local 553. Our rationale was that the conflicting interests of Local 553, the thirteen former Weber & Quinn employees, the Association and the bulk of Humble's employees would lead to "unrest and dissatisfaction" and that to order Humble to arbitrate with Local 553 might be tantamount to forcing Humble to bargain with a minority union in violation of the Labor Act.

This is not the occasion to re-examine *McGuire.* See Note, 66 Colum. L. Rev. 967 (1966). Regardless of whether

or not the same quantum of "unrest and dissatisfaction" and a similar threat of compelling the successor to commit an unfair labor practice are present, this case is controlled by *Wiley*. It makes no difference that jobs may be at stake here and seniority rights, pension funds, grievance and job security provisions, and severance and vacation pay were involved there. The *Wiley* Court recognized that problems might arise from the conflicting interests of the organized and unorganized employees. Also, the Court must have been aware of the unorganized employees' right to refrain from union activities. 29 U. S. C. §157. See *NLRB* v. *District 65*, —— F. 2d —— (2d Cir. March 24, 1967). Nevertheless, in ordering arbitration to proceed, the Court had "little doubt that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the Wiley plant." 376 U. S. at 551-52 n. 5. See also *Piano & Musical Instrument Workers Union, supra*. Should the award of the arbitrator, as distinguished from the process of arbitration, contravene national labor policy, it can be challenged in an action to vacate. See *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *Carey* v. *General Elec. Co.*, 315 F. 2d 499, 507-08, 511-12 (2d Cir. 1963), cert. denied 377 U. S. 179 (1964), and a decision requiring displacement of employees already employed at Lacquer before the takeover might well be considered to contravene national policy.

Reversed and remanded on the appeal of Lacquer Specialties, Inc., with instructions to determine the mechanics by which the New Jersey plant was acquired, and to stay arbitration as to the former owners who have dis-

posed of their interest in the plant, by whatever designation now known, but to deny a stay of arbitration as to the present owner of the plant. Affirmed on the appeal of Monroe Sander Corporation.

LUMBARD, *Chief Judge* (concurring in part and dissenting in part):

I agree that Monroe Sander[1] is bound to arbitrate with the union concerning rights and benefits under the collective bargaining agreement between them which the union contends survived the expiration of the agreement and the closing of Monroe Sander's plant. However, I cannot agree that the union's demand that workers employed at the Lacquer plant when Petrochemical acquired it should be discharged, if necessary, to provide jobs for at least some former Monroe Sander employees is arbitrable. This demand is, as the Supreme Court specifically stated that the demands it held arbitrable in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 555 (1964), were not, "so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction."

I recognize that, as the Court also stated in *Wiley*, 376 U. S. at 549-50, "the preference of national labor policy for arbitration as a substitute for tests of strength between contending forces [can] be overcome only if other con-

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[1] I do not believe that we should pass upon the question whether arbitration is proper as to new Lacquer, which has not been represented in these proceedings and has had no opportunity to contest, for example, the adequacy of notice to it. See *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 551 (1964).

siderations compellingly so [demand]." It seems to me, however, that this case presents such considerations, as did *McGuire* v. *Humble Oil & Ref. Co.*, 355 F. 2d 352 (2 Cir.), cert. denied, 384 U. S. 988 (1966). In *McGuire*, as in *Wiley*, employees sought arbitration against a successor employer; this Court found compelling against arbitration the considerations that possible preferential awards to those employees might cause "unrest and dissatisfaction" among other employees, and that such arbitration might constitute the unfair labor practice of bargaining with a group other than the certified bargaining representative.

The first of these considerations is even stronger in this case, as an award requiring the discharge of some or all Lacquer employees not only might but certainly would cause grave unrest and dissatisfaction among those employees. The inevitable, direct, and catastrophic impact such an award would have upon the Lacquer employees cannot be equated with the possible problems of special treatment as to seniority, pensions, and similar matters which the Supreme Court was confident could be avoided in *Wiley*. See 376 U.S. at 551-52 n. 5. It is true, as the union urges, that the second consideration in *McGuire* is absent here, since the Lacquer employees are not represented by a union. However, the Lacquer employees' lack of representation also seems to foreclose them from effective participation in any arbitration between Monroe Sander and the union,[2] and thus to render it even less

[2] Compare Bernstein, Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel, 78 Harv. L. Rev. 784 (1965); Jones, On Nudging and Shoving the National Steel Arbitration into a Dubious Procedure, 79 Harv. L. Rev. 327 (1965).

likely that the award the union seeks could be made acceptable to them.

A further compelling consideration against arbitration is that, as far as the Lacquer employees are concerned, a duty to arbitrate their retention of their jobs would indeed be, in the words of *Wiley*, 376 U. S. at 551, "something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." The teaching of *Wiley* is that a duty to arbitrate is not usually affected by a change in the ownership of a business, because a collective bargaining agreement "is more than a contract" and "calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 578-79 (1960). By contrast, the union's contention here is that a duty to arbitrate the continued holding of existing jobs was *imposed* upon the Lacquer plant by a change in ownership. An award directing the discharge of Lacquer employees to make room for former Monroe Sander employees not only would disrupt the established "common law" of the Lacquer plant, but would do so in a manner which the Lacquer employees can hardly have foreseen, and which they might well have sought to prevent by organizing or by agreement with old Lacquer if they had. Such a result would completely contravene the national labor policy of encouraging stable and peaceful industrial relations.

Neither in *Wiley* nor in the cases following it did such established and weighty interests of other employees militate against a demand for arbitration. Most cases following *Wiley*, like *Wiley* itself, involved successor employers

at the same plant. See, e.g., *United Steelworkers* v. *Reliance Universal Inc.*, 335 F. 2d 891 (3 Cir. 1964); *Wackenhut Corp.* v. *United Plant Guard Workers*, 332 F. 2d 954 (9 Cir. 1964). In *Piano & Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 221 F. Supp. 461 (N. D. Ill. 1963), rev'd, 333 F. 2d 761 (7 Cir.), rev'd *per curiam*, 379 U. S. 357 (1964), arbitration was directed where an employer shut down its plant and transferred production to a newly built plant. In such a case, and possibly in cases where production is transferred to an existing plant already owned by the same employer, see Feinberg, Transfer and Sale of Plant Operations in Arbitration, 13 Lab. L. J. 625, 638-40 (1962), there is no clearly justified reliance interest of other employees which would be directly and adversely affected by the award sought. However, where such an interest is present, as it is in this case, *Wiley* does not support an order directing arbitration on the sole ground that the acquired plant manufactures similar products in the same metropolitan area as the discontinued plant.

The union appears to argue that arbitration of its demand for existing jobs should be ordered even if an award granting the demand could not be enforced, apparently on the ground that arbitration even of a baseless claim may contribute to industrial peace. As a general proposition, this argument has been accepted by many commentators,[3] and finds some support in decisions of this Court.

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[3] See, e.g., Hays, Labor Arbitration, A Dissenting View 80-83 (1966); Meltzer, The Supreme Court, Arbitrability, and Collective Bargaining, 28 U. Chi. L. Rev. 464, 471-77 (1961); Wellington, Judicial Review of the Promise to Arbitrate, 37 N. Y. U. L. Rev. 471, 472-77 (1962).

See *Torrington Co.* v. *Metal Prods. Workers Union*, 362 F. 2d 677 (2 Cir. 1966); *Carey* v. *General Elec. Co.*, 315 F. 2d 499, 504-08 (2 Cir. 1963), cert. denied, 377 U. S. 908 (1964). But whether or not it is generally valid, the argument is clearly invalid here, as it was in *McGuire*, because the very process of arbitrating the union's demand for existing jobs at Lacquer would lead to unrest and dissatisfaction among the Lacquer employees. Any contribution arbitration of this demand would make to industrial peace among former Monroe Sander employees would seem more than counterbalanced by the distress it would cause the Lacquer employees.

Thus I would expressly exclude from the questions to be decided by the arbitrator the union's demand that Lacquer employees be discharged to provide jobs for at least some former Monroe Sander employees.

With the reservation noted in footnote 1, I concur in the remainder of the Court's decision.

Judgment and Order of Affirmance of the United States Court of Appeals

(Monroe Sander Action)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of May one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

THE MONROE SANDER CORPORATION,
Plaintiff-Appellant,

—v.—

DAVID LIVINGSTON, individually and as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Judgment and Order of Affirmance of the United States Court of Appeals (Monroe Sander Action)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed.

/s/ A. DANIEL FUSARO
Clerk

Judgment and Order of Reversal of the United States Court of Appeals

(Lacquer Specialties Action)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of May one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

LACQUER SPECIALTIES, INC.,
Plaintiff-Appellant,

—v.—

DAVID LIVINGSTON, individually and as the President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Judgment and Order of Reversal of the United States Court of Appeals (Lacquer Specialties Action)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this Court, with costs to the appellant.

/s/ A. DANIEL FUSARO
Clerk

Denial of Petition for Rehearing

(Monroe Sander Action)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE MONROE SANDER CORPORATION,

Plaintiff-Appellant,

—v.—

DAVID LIVINGSTON, individually and as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO,

Defendant-Appellee.

PETITION FOR REHEARING

WEISS, BRONSTON & ROSENTHAL,
New York, New York, for
plaintiff-appellant.

Petition denied.

J. J. S.
R. P. A.
U.S.C.JJ.

I dissent.

J. E. L.
U.S.C.J.

Jun 21 1967

Order of the United States Court of Appeals Denying Petition for Rehearing

(Monroe Sander Action)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of June, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

THE MONROE SANDER CORPORATION,
Plaintiff-Appellant,

—v.—

DAVID LIVINGSTON, individually and as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO,
Defendant-Appellee.

Order of the United States Court of Appeals Denying Petition for Rehearing (Monroe Sander Action)

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

Denial of Petition for Rehearing in Banc

(Monroe Sander Action)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE MONROE SANDER CORPORATION,

Plaintiff-Appellant,

—v.—

DAVID LIVINGSTON, individually and as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO,

Defendant-Appellee.

PETITION FOR REHEARING IN BANC

Weiss, Bronston & Rosenthal,
New York, New York, for
plaintiff-appellant.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

J. EDWARD LUMBARD
Chief Judge

21 June 1967

Order of the United States Court of Appeals Denying Petition for Rehearing in Banc

(Monroe Sander Action)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of June, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

Order of the United States Court of Appeals Denying Petition for Rehearing in Banc (Monroe Sander Action)

THE MONROE SANDER CORPORATION,

Plaintiff-Appellant,

—v.—

DAVID LIVINGSTON, individually and as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheared [*sic*] in banc having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO

Clerk

APPENDIX B

National Labor Relations Act

(29 U.S.C. §151 et seq.)

* * * * * *

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) * * * * *

(2) * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

* * * * *

SEC. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) • • • • •

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condititon of acquiring or retaining membership;

• • • • •

APPENDIX C

Dismissal of Charges by Regional Director of NLRB

NATIONAL LABOR RELATIONS BOARD
REGION 29
16 Court Street
Brooklyn, New York 11201

[SEAL] Telephone 596-3535

November 17, 1966

District 65, RWDSU, AFL-CIO
13 Astor Place
New York, New York

Re: Monroe Sander Corporation
Case No. 29-CA-689

Gentlemen:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it appears that, because there is insufficient evidence of any violation of the Act, further proceedings are not warranted at this time.

The investigation did not establish that Monroe Sander Corporation locked out and refused to reinstate its employees, or that the Company unlawfully refused to recognize District 65, Retail, Wholesale Department Store Union, AFL-CIO, as the bargaining representative for the employees in the Newark, New Jersey location, or that it otherwise unlawfully refused to bargain with your union. Rather, the evidence tends to show that the Company closed down the Long Island City operation for economic reasons,

discontinued such operation and bargained in good faith concerning the effect of such shutdown and concerning the rehire of the employees in New Jersey. In the circumstances the Company's failure to employ the Long Island City employees in New Jersey is not unlawful. Nor is the Company's refusal to go to arbitration on the question of whether employees should be hired in New Jersey, and its attempts to obtain a declaratory judgment in District Court concerning its obligation to proceed to arbitration on this matter, in contravention of the Act. See *Clyde Taylor Company,* 127 NLRB 103, 109. Further, the investigation did not establish that the Company violated the Act in any other manner encompassed by your charge.

I am therefore refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19) you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington, D. C. 20570, and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D. C. by the close of business on November 30, 1966. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request should be submitted to me.

Very truly yours,

SAMUEL M. KAYNARD
Regional Director

Registered Mail
Return Receipt Requested

Appendix—Dismissal of Charges by Regional Director of NLRB

CC: General Counsel
National Labor Relations Board
Washington, D. C. 20570

Monroe Sander Corporation
10-12 46th Avenue
Long Island City, New York

Weiss, Bronston & Rosenthal, Esqs.
Attn: Irwin M. Rosenthal, Esq.
295 Madison Avenue
New York, New York

Eugene Eisner, Esq.
13 Astor Place
New York, New York

Kirschenbaum, Schaffer [*sic*, should be Moskowitz] & Shapiro, Esqs.
Attn: George Moskowitz, Esq.
347 Madison Avenue
New York, New York 10017